United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

Affidavit

75-1138

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To be argued by
STEVEN A. SCHATTEN

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1138

UNITED STATES OF AMERICA,
Appellee,

—v.—

LOUIS R. WOLFISH,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Louis Wolfish appeals from a judgment of conviction entered on January 17, 1975 after a nine-day trial before the Honorable Lawrence W. Pierce, United States District Judge, and a jury.

Sealed Indictment 73 Cr. 1036, filed on November 15, 1973 in three counts, charged that Wolfish, in violation of Title 18, United States Code, Section 1341, devised a scheme to defraud the Bankers Security Life Insurance Society ("Bankers Life") out of approximately $200,000 in life insurance proceeds, by fradulently submitting to the latter a forged Israeli death certificate which purported to show that he, Wolfish, had died on January 7, 1971; and further charged that for the purpose of executing and attempting to execute that scheme, Wolfish had caused Bankers Life to place in the mail the following items:

(1) a letter, dated September 20, 1971, addressed to Mrs. Marcia Wolfish, 94 North Main Street, Spring Valley, N. Y. 10977 (Count One);

(2) a check in the amount of $180,484 mailed on December 27, 1971 to Marcia Wolfish at the above address (Count Two); and

(3) a check in the amount of $20,398 mailed on January 24, 1972 to Howard Blatt, a Bankers Life General Agent (Count Three).

On January 6, 1975, after an evidentiary hearing, Judge Pierce denied Wolfish's motion to suppress certain physical evidence seized by Israeli authorities from Wolfish's apartment in Jerusalem, Israel.* Trial commenced that same day and ended with a guilty verdict on January 17, 1975. On March 31, 1975, Judge Pierce sentenced defendant to concurrent terms of three and one-half years imprisonment on each of the three counts, and provided that, pursuant to the provisions of Title 18, United States Code, Section 4208(a)(1), defendant shall become eligible for parole after serving a term of one year.

Wolfish was continued on bail during the pendency of this appeal.

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* Prior to trial, Wolfish had petitioned this Court to mandamus Judge Pierce, the United States Attorney, Roy Cohn, Esq. and the law firm of Saxe, Bacon, Bolan & Manley, to dismiss the indictment or, in the alternative, to adjourn the trial. On December 30, 1974, this Court (per Judges Kaufman, Feinberg and Mansfield), without opinion, denied the petition for a writ of mandamus. *Wolfish* v. *Pierce*, Dkt. No. 74-2695 (2d Cir. Dec. 30, 1974).

Statement of Facts

Government's Case

Through the testimony of nineteen witnesses, including five who are citizens of the State of Israel, the Government established that, at all relevant times between 1970 and 1972, Wolfish* was the insured with respect to three life insurance policies on which Bankers Life was liable (GX 3, 4, 5).** One of these policies (GX 3) had originally been issued by the Postal Life Insurance Company, which had later merged into Bankers Life (Tr. 42); the other two policies (GX 4, 5), which Wolfish had applied for in 1964 and 1968, had been issued by Bankers Life (Tr. 77-79). The two Bankers Life policies had an aggregate face amount of $180,400, while the Postal Life policy was in the face amount of $20,000 (Tr. 44, 49; GX 9A, 10A). Marcia Wolfish, defendant's wife, was the beneficiary under each of these three policies (Tr. 63; GX 2, 14A, 14B).

On January 5, 1971, Wolfish visited the Israeli Consulate in New York where he met with Eva Bahrav, who was in charge of the notarization desk which, among other things, certified the accuracy of Hebrew-English translations of Israeli death certificates. Wolfish, who apparently did not identify himself, brought with him several copies of a forged Israel certificate in the name of Louis Wolfish, each accompanied by an English translation (Tr. 613-618).

At Wolfish's request, Mrs. Bahrav authenticated the accuracy of the English translation attached to each of the

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* Wolfish is an ordained rabbi, who practiced law in the United States for 13 years until his disbarment in 1969 for serious professional misconduct not related to the instant case. (Tr. of 3/31/75, 628). Sometime in 1970, Wolfish moved to Israel but continued to travel frequently between the United States and Israel until the summer of 1972 (Tr. 407-410). He returned to the United States some time thereafter. (Tr. 829-832).

** Government Exhibit is abbreviated herein as "GX", and reference to pages of the trial transcript as "Tr."

copies of the forged death certificate, which was in Hebrew, by attaching to the top of each set of papers a certification page bearing the signature of the Israeli Consul and an official seal (Tr. 615-618; GX 28A, 28B, 28C). Bahrav testified that Wolfish "was very interested in the technicalities of what I do. He asked me about every aspect, you know, I put the ribbon on and stuff like that, and what exactly the form on it says" (Tr. 622). During that meeting Wolfish inquired about the language of the certification used when dealing with copies, which provides that "nothing in this authentication of the translation shall be deemed to be an authentication of the contents of the translated document and the legal validity thereof" (Tr. 623). Bahrav told Wolfish that if he brought in the original death certificate that this language qualifying the certification would be omitted and instead there would be a certification of the correctness of the translation and of the stamp of the Ministry of the Interior as well, "which implies we certify the correctness of the document itself" (*Id.*; see, *e.g.*, GX 29A).

The reproduced Hebrew handwritten certificates of Wolfish's supposed death, the English translations of which were authenticated by the Israeli Consul (see GX 28A, 28B), were copied from an original and genuine death certificate of Wolfish's mother, Rebecca, which Wolfish, through forgery, had converted into a death certificate for himself (GX 30). Varda Tamir, an Israeli handwriting expert who heads the document laboratory of the Israeli National Police (Tr. 726), testified that in her opinion, the black pencil writings on the original of the bogus death certificate (GX 30) were in Wolfish's handwriting and had been substituted for certain of the original blue-colored writings (Tr. 903).* She testified further that, based on the results of her use of a process called infra red

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* Mrs. Tamir also testified, initially in response to questions put to her by Wolfish's counsel on voir dire (Tr. 950-951), that Wolfish had tried to disguise his handwriting when giving certain court-ordered exemplars of the same.

luminescence, the blue colored writings that had been erased from that document (GX 30) indicated that it had originally been the death certificate of Wolfish's mother, Rebecca (Tr. 743-744). Rebecca Wolfish, in fact, had died on August 11, 1970 in Jerusalem, Israel, where she had been living at the Central Hotel (Tr. 314-315).

On January 12, 1971, Wolfish returned to the Israeli consulate and requested authentication of the English translation of the Israeli death certificate of Rebecca Wolfish (Tr. 631-639). On this occasion Wolfish had with him an original of his mother's death certificate and ten copies. Bahrav told Wolfish that he had brought her too many copies and asked him to return later to pick up the completed documents. Wolfish did so the next day (Tr. 641). The certifications prepared by Bahrav on that occasion authenticated the accuracy of the English translations as well as the stamp of the Minister of Justice. These documents, authenticated on January 12, 1971, were subsequently altered. The copy of the death certificate of Rebecca Wolfish originally affixed to each set of those documents was removed and the purported Israeli death certificates of Louis Wolfish, and the English translations thereof, were substituted in their stead (Tr. 639; GX 29A-29H).* In the

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* On August 9, 1972, Israel police conducted a search of Wolfish's apartment at 4 Mewo Timna Street in Jerusalem, pursuant to a search warrant issued in the course of an investigation of various possible offenses under Israeli law growing out of the forgery of an Israeli death certificate. Seized from the apartment on that date were the following: the death certificate of Louis Wolfish, authenticated by the Israeli Consul on January 5, 1971 (GX 28A, 28B); those of Louis Wolfish which had been substituted for the Rebecca Wolfish death certificate authenticated on January 12, 1971 (GX 29A-29H); the original of the Louis Wolfish handwritten death certificate containing Wolfish's handwriting in black pencil (GX 30); the death certificate of Wolfish's mother which had been tampered with (GX 31); two boxes of red notarial

[Footnote continued on following page]

process the raised seal of the Israeli Consulate (see GX 28A, 28B), was removed and a new, unraised red seal substituted (Tr. 639-640).

On February 11, 1971, Wolfish returned to Israel. Some six months later, on August 11, 1970, he again departed from Israel (Tr. 407-408; GX 43A, 55).

Thereafter, a letter, dated August 29, 1971, was sent to Emanuel Mack, an Israeli advocate and notary in Jerusalem, signed purportedly by Marcia Wolfish, which carried the return address of 25-10 30th Road, Astoria, New York (the home of Mr. and Mrs. Israel Horowitz, Wolfish's brother-in-law and sister, respectively) (Tr. 259; GX 22). The letter enclosed nine typewritten Israeli death certificates purportedly showing that Louis Wolfish had died in Jerusalem on January 7, 1971. The letter requested that Mack provide notarized translations for each of the nine identical death certificates, and that Mack have them certified by the United States Consulate in Jerusalem. Mack prepared the requested English translations (see, *e.g.*, GX 1, p. 2), filled out a certificate of translation in English and Hebrew (GX 1, p. 1), and bound the three pages with red ribbon and seal (GX 1; Tr. 146).* Thereafter, the nine death certificates were brought to the Israeli Ministry of Justice and to the United States Consulate in Jerusalem for the necessary certifications (Tr. 147).

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seals (GX 27, 27A); certain other death certificates and related documents, including some that had obviously been tampered with (see, *e.g.*, GX 37), and certain correspondence, including letters from Wolfish in New York to his wife, Marcia, and their children in Jerusalem, Israel (see GX 45A, 45B). One of these latter letters is dated January 23, 1971 (GX 45B), just 11 days after Wolfish's second visit to the Israel Consulate.

* Government's Exhibits 23A-23I are Mack's copies of the certificates of translation he prepared with respect to the nine death certificates (Tr. 148-150). Among the nine typewritten Hebrew death certificates that Mack received was the one which eventually was sent to Bankers Life (Tr. 144; GX 1, p. 3).

On September 10, 1971, Mack sent the nine completed death certificates, together with a statement, by registered mail, Registry No. 00035, to Mrs. Marcia Wolfish at the 25-10 30th Road, Astoria, New York residence (Tr. 153-154; GX 24).*

On September 15, 1971, Postman Carmine Lisio, attached to the Astoria branch of the Long Island City Post Office, delivered the registered letter from Mack in Jerusalem, Israel (containing Registry No. 00035) (Tr. 184; GX 25). Lisio testified that the registry receipt (GX 25) had been signed in the name of "L. Wolfish", but that he could not remember precisely who had signed for the registered letter (Tr. 187). Lisio further testified that he would have delivered the registered letter to one of only three people: Mr. Israel Horowitz, Mrs. Israel Horowitz or Wolfish (Mrs. Horowitz's brother) (Tr. 188-189, 194-195). Lisio had been introduced to Wolfish as a person who would be receiving mail in care of Mr. Horowitz at the latter's Astoria residence (Tr. 182). Lisio further testified that when Mr. and Mrs. Horowitz signed for mail they used their own names and, similarly, so far as he was aware, Wolfish had used "his own name" when signing for mail (Tr. 188-190).

On September 16, 1971, Eva Neill, a claims examiner at Bankers Life, received notification from the Bankers Life's New York office that Louis R. Wolfish had died on January 7, 1971, and that the death claim forms were to be sent to Mrs. Marcia Wolfish, 94 North Main Street, Spring Valley, New York (Tr. 15-20; GX 8A, 8B).**

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* Mack testified that mistakenly the letter bore the date of August 10, 1971, rather than September 10, 1971, the date on which it had been sent. However, the registry affixed to the letter (GX 24) bears the September 10, 1971 date.

** On July 7, 1970 and, again, sometime between December 15, 1970 and December 21, 1970, Wolfish had filed change of address forms requesting the postal service to forward all mail sent to him at 94 North Main Street, Spring Valley, New York to the Horowitz residence in Astoria (Tr. 121-124, 598; GX 21A, 21B). Wolfish had formerly utilized the Spring Valley, New York address as an office prior to moving to Israel in 1970 (Tr. 79-80, 262; GX 14B).

On September 20, 1971, Mrs. Neill sent out a form letter to Mrs. Marcia Wolfish at 94 North Main Street, Spring Valley, New York (GX 6), enclosing a form of claimant's statement and requesting that a claimant's statement, a certified copy of Wolfish's death certificate, the insurance policies and, in the case of the $20,000 Postal Life policy, a tax waiver form, be furnished to the insurance company before payment could be made (Tr. 22) (Count One).

On October 28, 1971, Wolfish reentered Israel and on November 21, 1971 once again left Israel. (GX 42D, 42F, 43A, 55). On November 21, 1971 from the Horowitz residence, Wolfish mailed a letter to his wife, Marcia, and their children in Israel, which referred to his flight (GX 45A). The evidence further established that during this period Wolfish was traveling on two passports (GX 43A, 55).

On December 23, 1971, Bankers Life received the Israeli death certificate advising of Wolfish's supposed demise in Jerusalem on January 7, 1971 (GX 1).* At the same time, the company received the three insurance policies (GX 3-5), and the claimant's statement (GX 2), purportedly signed by Marcia Wolfish, which stated that Wolfish had died on January 7, 1971 in Jerusalem (Tr. 36-38).

On December 27, 1971, Bankers Life mailed its check (GX 9) in the amount of $180,484.32 on the two policies originally issued by Bankers Life (GX 4-5) to Mrs. Marcia Wolfish at the Spring Valley, New York address (Tr. 46-49; GX 9B), which in turn was rerouted to the Horowitz residence in Astoria as a result of the change-of-address forms (Count Two).

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* Menachem Sternhall, the Israeli registrar of births and deaths, testified that Government's Exhibit 1 was a forged document (Tr. 310-311), that a search of his records failed to disclose any record of the death of Louis Wolfish (Tr. 311), but that his records did reflect the death of Rebecca Wolfish in Jerusalem on August 11, 1970 (Tr. 314-315).

On January 21, 1972 Bankers Life received the New York tax waiver form (GX 10C) pertaining to the Postal Life $20,000 policy and, shortly thereafter, Mrs. Neill mailed a check payable to Mrs. Marcia Wolfish in the amount of $20,058.12 (to cover the face amount of the policy, a premium refund and a dividend) (Tr. 49-51; GX 10, 10C), to Horowitz-Blatt, the general agent who had dealt with Wolfish in connection with the issuance of two of the policies (Tr. 49-52, 76-77, 81-83) (Count Three). Mr. Blatt received this check on January 26 or 27, 1972 (Tr. 81), and endeavored unsuccessfully, to deliver it to Mrs. Wolfish in Spring Valley, where she could not be found (Tr. 82-83). Thereafter, Mr. Blatt contacted his home office, and later returned the check.

On February 21, 1972, the Dime Savings Bank of New York received the $180,484.32 check, payable to Marcia Wolfish (GX 9), together with eight signature cards (GX 17A-17H) and an unsigned slip of paper requesting that $22,560.54 be deposited into each of the eight accounts (Tr. 100-103; GX 16).

Each of the signature cards (GX 17A-17H) was in the name of Marcia Wolfish and Louis Wolfish, and bore purported signatures of Marcia Wolfish and Louis Wolfish. The check itself bore the purported endorsement of Marcia Wolfish. John Murray, a handwriting expert, testified that each of the signatures on the cards and on the check was a traced signature. Mary Lou Sciaraffo, an account teller at the Dime Savings Bank, testified that she had deposited the check and opened the eight savings accounts as directed (GX 19A-19H).

Sometime after the search of Wolfish's Jerusalem apartment conducted by Israeli police on August 9, 1972 (see pp. 5-6n., *supra*), Wolfish left Israel.* Leonard Bitterman, who served as president of the Men's Club of the

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* While in Israel, Wolfish had been living under the assumed name of Eliezer Leviathan.

Ahavas Israel Synagogue in Passaic, New Jersey, testified that in or about the summer of 1972, Wolfish, under the name of Haim Whale, became the rabbi of that New Jersey synagogue.

Defendant's Case.

The defendant did not take the stand.

The defense, through Postal Inspector John Slavinski, introduced certain fingerprint reports indicating that a fingerprint examination of certain documents introduced in evidence (*e.g.*, GX 1, 9, 17A-17H, 21A, 21B) failed to reveal the existence of Wolfish's fingerprints on them.

ARGUMENT

POINT I

The trial court's jury instruction on Wolfish's decision not to testify did not violate his Fifth Amendment rights.

Wolfish contends for the first time on appeal that the trial court's jury instruction regarding Wolfish's decision not to testify was violative of his Fifth Amendment privilege against self-incrimination and requires reversal. The argument is without merit.

On this issue, Judge Pierce instructed the jury as follows:

> "The burden of proving guilt beyond a reasonable doubt never shifts. It remains upon the Government throughout the trial. The law never imposes upon a defendant in a criminal case the burden of calling any witnesses or producing any evidence. You may draw no unreasonable inferences against the defendant because he did not take the stand and testify.

> In addition, you may not speculate as to why the defendant chooses not to testify nor may you speculate as to what the defendant might have stated had he chosen to testify. In every criminal case, there is a Constitutional rule which every defendant has the right to rely upon. It is the rule that no defendant is compelled to take the witness stand. It is the prosecution which must prove a defendant guilty as charged beyond a reasonable doubt.
>
> . . . The defendant is presumed to be not guilty of the accusations contained in the indictment and this presumption continues not only throughout the trial but even during your deliberations in the jury room" (Tr. 1104-05).

Wolfish specifically attacks Judge Pierce's use of the sentence, "You may draw no unreasonable inferences against the defendant because he did not take the stand and testify." Isolating that part of the instruction from its proper context, Wolfish asserts that its use was tantamount to instructing the jury that it could draw *reasonable* inferences against the defendant because of his failure to testify. Reference to the instruction in its entirety, however, makes clear that no such meaning was either intended by the court or could have been conveyed to the jury.*

Wolfish's strained interpretation is clearly belied by the very next sentence of the charge: "you may not speculate as to why the defendant chooses not to testify, nor may you spe-

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* Assuming that the pertinent words of the trial court's charge were accurately recorded and transcribed, it appears that the court's use of the term "unreasonable inferences" was a slip of the tongue. Wolfish's trial counsel had specifically requested the trial court, and the latter had agreed, to charge the jury that it should draw no "unfavorable inferences" from Wolfish's failure to testify (Tr. 958). "Unreasonable" was apparently thereafter transposed for "unfavorable".

culate as to what the defendant might have stated had he chosen to testify." The trial court then proceeded to stress a defendant's right to rely upon the presumption of innocence and upon his constitutional right not to be compelled to testify. Taken as a whole, the trial court's charge fully protected Wolfish's rights by making clear that no adverse inference was to be drawn against him by reason of his failure to testify.

The essence and intelligible meaning of the charge in the case at bar are wholly different from those of the charges disapproved in *Griffin*, v. *California*, 380 U.S. 609 (1965); *Fontaine* v. *California*, 390 U.S. 593 (1968); and *Virgin Islands* v. *Bell*, 392 F.2d 207 (3rd Cir. 1968).* Nothing remotely approaching that language is present here and *Fontaine*, *Griffin* and *Bell* are of scant or no assistance in the present context.

Moreover, Wolfish's experienced trial counsel, who had requested a jury instruction on the subject in issue, made no objection to the charge as delivered. The use of the term "unreasonable inference", in an otherwise unchallenged set of jury instructions, hardly constitutes "plain error". See Fed. R. Crim. P. 52(b). Accordingly, Wolfish's failure to object below itself warrants denial of this asserted ground for relief. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).

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* *Griffin* and *Fontaine* reviewed what was then the standard charge in the California state courts on this subject. That charge provided in pertinent part:

> "As to any evidence or facts against him which the defendant can reasonably be expected to deny or explain because of facts within his knowledge, if he does not testify or if, though he does testify, he fails to deny or explain such evidence, the jury may take that failure into consideration as tending to indicate the truth of such evidence and as indicating that among the inferences that may be reasonably drawn therefrom those unfavorable to the defendant are the more probable." *Griffin* v. *California*, 380 U.S. at 610.

POINT II

There was no impropriety in the prosecutor's summation.

Relying on a few lines taken from the middle of the prosecutor's two-hour summation, Wolfish claims that he was the victim of the prosecutor's improper appeal to the jury's passions and of the prosecutor's attack on him because of his religious calling. The argument is wholly without merit, distorts out of all proportion a single point made during a lengthy summation, ignores the plain fact that Wolfish's counsel had sought to explain much of Wolfish's conduct on the basis of his religious calling and had gone so far as accusing the Government of "framing" Wolfish, and fails to recognize that the measured words did little more than address to the jury's attention one of the basic principles of Wolfish's religious calling which, as the trial court recognized, would have been violated if, and only if, the jury was persuaded by the Government's evidence of Wolfish's guilt of the crimes charged. Unlike the cases relied on by Wolfish, such as *United States* v. *Curtiss*, 330 F.2d 278 (2d Cir. 1964) (faker) and *United States* v. *Gonzalez*, 488 F.2d 833 (2d Cir. 1973) (repeated junk dealer), the prosecutor at no time employed any epithets, religious or otherwise.

The prosecutor's remarks in summation challenged here were the product of the following circumstances: At the end of a nearly two-week trial, Wolfish's trial counsel argued to the jury during his summation of more than two hours that the prosecutor and the Government postal inspector had improperly coached Eva Bahrav—the woman employed by the Israeli Consulate in front of whom Wolfish had appeared on three occasions to have death certificates certified

—on Wolfish's appearance and on how to identify him in the courtroom.*

Wolfish's trial counsel also argued in his closing remarks that Wolfish's use of false names had been done solely for religious reasons and that the jury should not draw any adverse inference by reason of his name changes from Wolfish to Leviathan to Whale (Tr. 1038-1039). Defense counsel's summation soared to new rhetorical heights when he sought to analogize Wolfish's conduct in that regard to that of Sister Elizabeth and, indeed, to that of the Pope!** Moreover defense counsel's summation impliedly appeared to seek special dispensation for his client on account of his religious calling (Tr. 1040).

In the middle of the prosecutor's summation, during discussion of the testimony of the Hebrew handwriting expert, Mrs. Tamir, it was stated:

> "Then we come to the testimony of Mrs. Varda Tamir. This is the woman who was the head of the Jerusalem Laboratory for the investigation of documents. She testified that she investigates documents

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* Mr. Rosen: "No[w], I ask you, do you think, no matter what this very nice lady [Eva Bahrav] says, do you think that Mr. Schatten or Mr. Slavinski, before she took the stand, didn't say to her; 'He [Wolfish] is over there in the corner, but don't confuse him with the guy that has got the glasses on his head; it's the guy in the far corner.' Maybe they didn't. Maybe they did. . . ." (Tr. 1007).

** Mr. Rosen: "I am not an expert in religion but I do ask you to try to use some of your own experience. Women who become nuns will use, like, Sister Elizabeth, or even imagine the Pope, Pope Pius, that is not his name but that is his religious name.

"Haim and Whale mean Wolfish, and Leviathan. If he really wanted to go underground, he wouldn't stand up in a pulpit across the George Washington Bridge and use a Hebrew name that can be translated into Wolfish. But, that's the type of thing, the inference they want you to draw" (Tr. 1039).

throughout Israel, and you have to remember with Israeli witnesses, any foreign individual, their vocabulary—I have to submit to you you can appraise her yourself, Mrs. Tamir spoke a very, very fine English, but in the nature of things they are going to have perhaps a little bit of difficulty when people try to, attempt to confuse their testimony, although I must say, and submit to you, that Mrs. Varda Tamir's testimony came out clear as a bell.

She identified Louis Wolfish as having his black pencilled handwriting on Government's Exhibit 30. This item here, where the defendant tried to convert the death certificate of his own mother into his own. A man named Moses on a Mount named Sinai brought forth the Ten Commandments, and one of those commandments proclaimed honor [thy] father and mother.

Bring Government's Exhibit 30, the forged death certificate that has been tampered with, the forged death certificate being coverted from the death certificate of Mrs. Rebecca Wolfish into the death certificate of Louis Wolfish—bring that exhibit with you into the jury deliberation room and you will see the attitude toward those Ten Commandments exhibited by this defendant Rabbi Wolfish.

Then Mr. Rosen points out in his examination about the disguise, and he was saying, well, how can anybody tell when somebody is disguising something.

Here is Mrs. Tamir's testimony on the subject:

'First, I tried to dictate him full words but he wouldn't write full words,' this is at page 757.

'And asked me to spell each letter separately. So all along the dictation I spelled each letter separately.'

'Then he wrote in a fantastic form and start and wrote in a position to Hebrew writing [sic]. Hebrew writing is writing from top to bottom'" (Tr. 1081-1082).

Thereafter, during a recess and out of the jury's presence, defense counsel objected to this portion of the summation and the trial court denied the application pointing out that it was the Government's contention, based on the evidence presented, that Wolfish had used his mother's death certificate to assist him in preparing the forged death certificate and that the prosecutor was "engaged in a discussion of the facts as he contends those facts to be, and we have him urging the jury to draw some inferences namely, that if one would indeed take one's mother's death certificate and use it in the fashion the overnment contends that it hardly represents honor of one's mother or father" (Tr. 1084-85).

The trial court's ruling was plainly correct. The prosecutor's summation did not seek to rely on any fact extraneous to the case. In effect the summation did no more than suggest to the jury that, if the jurors found the facts as the Government submitted them to be, Wolfish was guilty of the crimes here charged and should not be accorded special dispensation or clemency on account of the fact that he was a rabbi. Moreover, the prosecutor's challenged remarks were no more than fair reply to the attacks on the integrity of the prosecution, including a charge that Wolfish had been "framed", and to defense counsel's efforts to justify, by religious analogies, Wolfish's change of names and his efforts to derive other benefits from the fact of Wolfish's identity as a rabbi. See, *e.g.*, *Lawn* v. *United States*, 355 U.S. 339, 359-360 n. 15 (1958); *United States* v. *Benter*, 457 F.2d 1174, 1176 (2d Cir. 1972); *United States* v. *Greenbank*, 491 F.2d 184 (9th Cir. 1974).

As was recently pointed out:

> "It is ironic that defense counsel, upon such a record, should have the temerity to attack the prosecutor's summation." *United States* v. *De Angelis*, 490 F.2d 1004, 1012 (2d Cir.) (Mansfield, *J.* concurring), *cert. denied*, 416 U.S. 956 (1974).

Indeed, in view of the overwhelming evidence of Wolfish's guilt and given the nature of defense counsel's summation, the remarks of this Court in *United States* v. *Santana*, 485 F.2d 365, 371 (2d Cir. 1973) are particularly apposite:

> "In this, as in many other cases where a defendant's guilt is plain, counsel for a defendant who insists on standing trial has little to offer except attack on law enforcement officers. While prosecutors would be wiser not to take such attacks too seriously, they can hardly be censured for responding sharply to criticisms they believe to be wholly unjustified, and courts should not be overly nice in such cases in scrutinizing the give-and-take of summation. Save in extreme instances, the judge's charge and the jury's good sense can be counted on to set things right. See *United States* v. *DeAlesandro*, 361 F.2d 694, 697 (2 Cir.), *cert. denied*, 385 U.S. 842, 87 S. Ct. 94, 17 L.Ed. 74 (1966); *United States* v. *Briggs*, 457 F.2d 908, 911, 912 (2 Cir.), *cert. denied*, 409 U.S. 986, 93 S.Ct. 337, 34 L.Ed. 2d 251 (1972). We are confident that was the case here." *Accord, United States* v. *Bivona*, 487 F.2d 443, 447 (2d Cir. 1973).

POINT III

The Government's concededly timely filing of its notice of readiness was not invalidated by the Government's subsequent motion for an order compelling Wolfish to provide exemplars of his handwriting.

Wolfish asserts that the Government by moving in August 1974, before trial, for an order compelling him to execute exemplars of his handwriting, thereby rendered its Notice of Readiness, earlier filed on July 8, 1974, a sham and a nullity, and consequently placed the prosecution in violation of Rule 4 of the "Southern District Rules Regarding Prompt Disposition of Criminal Case". The argument is without merit.

Wolfish concedes, as he must, that the Government filed a timely notice of readiness on July 8, 1974, announcing its readiness for trial on July 22, 1974.* Trial was scheduled for July 22, 1974 by Judge Bauman, to whom this case originally was assigned.

By reason of Judge Bauman's impending departure from the Court, trial did not take place as scheduled, and instead the case was reassigned to Judge Pierce. At a conference on August 7, 1974—at which Wolfish was present—Judge Pierce set January 6, 1975 as the date for trial and gave the parties until August 30, 1974 to file further motions. At about that time, by notice of motion, dated August 5, 1974, the Government moved for an order requiring defendant to furnish additional handwriting exemplars. In support of its motion, the Government submitted an affidavit of Assistant United States Attorney Steven A. Schatten, which stated in part that while the Government was then prepared to go to trial, the evidence to be provided by exemplars was anticipated to be of value in further substantiating the Government's case. This motion was granted on August 21, 1974 over Wolfish's objection that the Government's notice of readiness precluded it from conducting further pre-trial proceedings. The exemplars were taken, after considerable delay and difficulty.**

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* Wolfish was indicted on November 15, 1973, and was a fugitive until he surrendered on February 14, 1974. Accordingly, the six-month period within which the Government was required to file its notice of readiness did not begin to run until February 14, 1974—the date of Wolfish's surrender.

** Subsequently, by notice of motion dated December 18, 1974, Wolfish moved *pro se* for an order striking the Government's notice of readiness and dismissing the indictment, claiming that the Government had not complied with the Plan. By order dated December 19, 1974, the trial court refused to rule on the merits of this motion because the deadline for making pretrial motions—August 30—had long since elapsed, and in addition, the motion had not

[Footnote continued on following page]

Whatever may be left of Wolfish's claim in this forum, after Judge Pierce's rejection of his claim below and this Court's denial of his related and ensuing petition for writ of mandamus, it is clear that the asserted ground for relief is without substantive merit. The Government was at all times ready after July 22, 1974 to proceed to trial as announced in its Notice of Readiness. It did not at any time seek a continuance. Moreover, its motion to obtain handwriting exemplars from Wolfish was brought on and decided early within the more than five-month period between the first and second scheduled trial dates, and within the period specified by Judge Pierce for additional motions. The exemplars were needed to augment other writings of Wolfish in the Government's possession in order that, among others, the Israeli Hebrew handwriting expert might have a sufficient basis for making definitive conclusions regarding the authorship of certain questioned documents, including specifically GX 30 (the handwritten Israeli death certificate wherein the black pencil writing was identified as Wolfish's).

The case law squarely holds that it is not error to require a defendant to furnish exemplars shortly before the commencement of trial. *United States* v. *Izzi*, 427 F.2d 293 (2d Cir. 1970), *cert. denied*, 399 U.S. 928 (1970) (6 days prior to trial). Here, Wolfish was ordered to give exemplars many months before the date of trial, and the entire process occasioned no delay in the trial itself.

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been made by Wolfish's counsel of record. Wolfish thereafter filed a *pro se* petition for a writ of mandamus, seeking, *inter alia*, an order compelling Judge Pierce to dismiss the indictment on the ground that the Government's notice of readiness was false. That petition for a writ of mandamus was denied by this Court without opinion on December 30, 1974. *Wolfish* v. *Pierce*, Dkt. No. 74-2695 (2d Cir. Dec. 30, 1974).

Wolfish has cited neither legal authorities nor any provision of the Plan in support of his contention that the filing of a notice of readiness bars the Government from conducting any further pre-trial investigation. Dismissal under the six-month rule clearly is not warranted where the Government has filed a timely notice of readiness and is indeed ready. In this case, where the Government made no request for any continuance, it is illogical to conclude that because handwriting exemplars were sought after the notice was filed the Government was not ready to try the case at any time on the basis of the other evidence it possessed. Indeed, in *United States* v. *Pollak*, 364 F. Supp. 1047, 1050 (S.D.N.Y. 1973), *aff'd*, 492 F.2d 1237 (2d Cir. 1971), the Court held that the Government's filing of its bill of particulars after the expiration of the pertinent six-month period did not invalidate its earlier and timely filed notice of readiness:

> "[T]his court cannot say that Rule 4 requires a holding that the Government was unready merely because it did not supply the bill of particulars before the expiration of the six-month period of Rule 4." *Id.*

Finally, the argument advanced by Wolfish finds no support in the basic policy of the Plan. The construction of the Plan urged by Wolfish—that any pre-trial action taken by the Government after its notice of readiness is filed voids the notice—would in effect freeze the Government's case as of the time that the notice was filed. On pain of dismissal of the indictment, the Government would be precluded from seeking additional witnesses, conducting further investigation of the facts, or indeed perhaps even reviewing matters with witnesses immediately before trial. It is hard to imagine a more shortsighted and unsound policy than that which Wolfish recommends, and the Plan certainly cannot be read to embody such a rule. As this Court

has said in construing the Second Circuit Rules which preceded the Plan:*

> "The Second Circuit Rules Regarding Prompt Disposition of Criminal Cases were not intended to straight-jacket the administration of criminal justice in the federal courts, nor were they intended to place obstacles in the path of legitimate law enforcement efforts. . . ." *United States* v. *Pierro*, 478 F.2d 386, 389 (2d Cir. 1973).

Wolfish's claim that the six-month rule was violated should be rejected.

POINT IVA

The testimony of the government's handwriting expert that Wolfish had disguised his handwriting in giving court-ordered exemplars was first elicited by defense counsel on voir dire and, in any event, was clearly admissible.

Wolfish contends that the Government impermissibly elicited the opinion of the Israeli handwriting expert, Varda Tamir, that Wolfish had disguised his handwriting in giving court-ordered Hebrew exemplars and that reference to this is the prosecutor's summation was improper. The contention is unsound.

Wolfish's argument neglects the plain fact that Mrs. Tamir's testimony that Wolfish disguised his Hebrew exemplars was first adduced on voir dire by defense counsel.

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* Decisions under the Second Circuit Rules should be given considerable weight in construing the Plan. See *United States* v. *Bowman*, 493 F.2d 594, 595 n.3 (2d Cir. 1974); *United States* v. *Lasker*, 481 F.2d 229, 232 n.1 (2d Cir. 1973), *cert. denied*, 415 U.S. 975 (1974).

The latter apparently sought to establish that Mrs. Tamir's failure to use the court-ordered exemplars on her chart comparing known and questioned handwriting samples (GX 66) indicated that Wolfish was not the author of the black pencil notations on the original hand written death certificate of Wolfish's mother which was thereafter altered to evidence the purported death of Wolfish himself (GX 30). Defense counsel, in so doing, occasioned the following:

> "Q: [By Mr. Rosen] In other words, you took these exemplars, all these pages here were 53-A, before you made the chart?
> A: [By Mrs. Tamir] Yes.
> Q: And you didn't use these examplars on this chart, is that your testimony?
> A: Yes, because the handwriting is disguised.
> Q: This handwriting is disguised?
> A: That's right." (Tr. 751)

A short time later, in answer to certain defense contentions with respect to the exemplars, the trial court confirmed that it was during defense counsel's examination that the testimony that Wolfish had disguised his exemplars first arose (Tr. 761-762).* .

Following the voir dire examination of Mrs. Tamir by defense counsel, quoted above, the Government in its direct and redirect case, and the defense in its cross-examination, both explored the fact of, and bases for, Mrs. Tamir's conclusion that Wolfish had provided disguised handwriting exemplars (Tr. 878, 879, 880, 890-91, 900).

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* In this Court Wolfish incorrectly asserts that the challenged testimony was the product of the Government's questioning (Wolfish Brief, p. 24). And although Wolfish attaches p. 751 of the trial transcript to his Appendix (A. 263), he omits p. 750 which would have revealed that the challenged testimony had been elicited by his own trial attorney.

In summation, defense counsel again endeavored to urge differences between the handwriting of the court-ordered exemplars and that found on the highly incriminating and altered death certificate of Wolfish's mother (GX 30) as a basis upon which the jury should find that Wolfish could not have been the author of GX 30.* Defense counsel in summation, further attacked Mrs. Tamir by claiming that a handwriting expert could not tell if someone was disguising his handwriting (Tr. 1025-1027). In response, the prosecution in his summation read from Mrs. Tamir's testimony that, while providing the exemplars, Wolfish would not write out complete words and, moreover, that he wrote individual letters from bottom to top, whereas Hebrew letters are ordinarily written from top to bottom (Tr. 1082-1083). The prosecution concluded by asking the jury to find that Wolfish's conduct in disguising his handwriting was further evidence of his guilt of the crimes charged (Tr. 1083).

This Court stated in *United States* v. *Izzi*, 427 F.2d 293, 295 n.1 (2d Cir.), *cert denied*, 399 U.S. 928 (1970) that:

> "If an accused were free to disguise his handwriting, by writing the requested words in block capitals or with his opposite hand, without fear of any sanction, exemplars would be worthless and the authorization to compel their execution granted by *Gilbert* [v. *California*, 388 U.S. 263 (1967)] illusory." 427 F.2d at 295 n. 1.

The Court went on to point out that:

> "If *Gilbert* is not to be rendered meaningless, the government must be allowed to explain differences between the exemplars and the signature sought to be identified, particularly where the defense points to

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* For example, defense counsel argued in this regard: "She is not here to say there are differences; she is here to say they are the same. She can't. You don't have to be a handwriting expert." (Tr. 1029; see Tr. 1028-1030).

those differences as evidence of non-common authorship." 427 F.2d at 296.

The question specifically left undecided by this Court in *Izzi* is not pertinent here since there was no finding below, or any basis for any such finding, that the Government had intentionally sought to capitalize on any implied admission of Wolfish arising from an alleged attempt by him to disguise his exemplars. The request for the additional exemplars here was the product of the fact that Mrs. Tamir, without them, had been unable to reach definitive conclusions of authorship of certain questioned writings (Tr. 842-843, 849, 881).

In this connection, the Fifth Circuit in *United States* v. *Stembridge*, 477 F.2d 874 (5th Cir. 1973), recently rejected a defendant's contention that the characterization of his exemplars as disguised was testimonial use of those exemplars in violation of his Fifth Amendment privilege. The Court there analogized the situation to one involving a refusal to give exemplars, in which the prosecution may properly rely on the adverse inference to be drawn from the refusal. See *United States* v. *Doe*, 405 F.2d 436, 438 (2d Cir. 1968). As was said in *Stembridge*:

> "An attempt to disguise the handwriting in an exemplar, in effect, a refusal to provide an exemplar, for if an accused were free to disguise his writing, without any sanctions, exemplars would be worthless. Hence it is not improper for the prosecution to show that the defendant attempted to avoid providing a valid handwriting sample by intentionally distorting his handwriting." 477 F.2d at 876.*

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* Wolfish claims in error he was denied the right to counsel at the taking of his exemplars. As the affidavit of the Assistant United States Attorney, sworn to on August 5, 1974, pointed out: "The Government has no objection to defendant's attorney being present at the furnishing of the exemplars." The other supposed points in the footnote on p. 26 of Wolfish's Brief on Appeal can be answered by noting that it was defense counsel who first elicited the fact that Wolfish had disguised his exemplars.

POINT IVB

The testimony of the Government's Hebrew handwriting expert was premised on properly authenticated samples of Wolfish's handwriting and was properly admitted.

Wolfish contends that the opinion testimony of the Government's Hebrew handwriting expert was premised on supposedly known, but in fact insufficiently authenticated, samples of his handwriting, and on the court-ordered exemplars which were allegedly disguised. Hence he argues that there was an inadequate foundation for the opinion testimony and it should have been stricken. The argument is without merit.

Mrs. Tamir, the handwriting expert, testified that her conclusion that Wolfish was the author of the black pencil notations on the altered death certificate of Wolfish's mother (GX 30) was based on an analysis of that document and the samples of Wolfish's known handwriting—*i.e.*, on the court-ordered exemplars and Government's Exhibits 45A and 45B (Tr. 888-891, 900); and further that she could identify the handwriting of the court-ordered exemplars with that of Government's Exhibits 45A and 45B (Tr. 890).* Using only Government's Exhibits 45A and 45B, Mrs. Tamir was able to make a near identification with the writing on the forged

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* Wolfish incorrectly claims that the Government conceded that it was not known who wrote GX 45A and 45B. All the Government stated was that, at that point in the trial, there was no testimony as to who wrote these two letters. However, thereafter Mrs. Tamir testified that she was able to identify the handwriting on Wolfish's exemplars with that on GX 45A and 45B (Tr. 889-891). She further testified that although a person may endeavor to disguise his handwriting, the subtler aspects of the handwriting will nonetheless be revealed because the writer cannot change his essential characteristic features. She could therefore identify GX 45A and 45B as being in Wolfish's handwriting.

handwritten death certificate of Wolfish's mother (GX 30). With the aid of the exemplars, however, she was able to reach a final definitive conclusion that Wolfish had authored the altered black pencil portions of the bogus death certificate, GX 30 (Tr. 805-06, 846, 890-91).

The standards for the admission of handwriting samples are well-established. The handwriting specimen must be authenticated, which means its authorship must be proved. *United States* v. *Wagner*, 475 F.2d 121 (10th Cir. 1973); *United States* v. *White*, 444 F.2d 1274 (5th Cir.), *cert. denied*, 404 U.S. 949 (1971). The proof of authorship may be by direct or circumstantial evidence. *United States* v. *Swan*, 396 F.2d 883 (2d Cir. 1968), *cert. denied*, 393 U.S. 923 (1968); *United States* v. *Reed*, 439 F.2d 1 (2d Cir. 1971); *United States* v. *White*, *supra*. And the trial court's ruling, if fairly supported by the evidence, may not be overturned. *United States* v. *Swan*, *supra*; *United States* v. *White supra*.

Here, of course, there is no dispute that Wolfish was the author of the court-ordered exemplars (GX 53). And the circumstantial evidence that Wolfish had written Government's Exhibits 45A and 45B is overwhelming. These two exhibits are copies of two letters addressed to Mrs. Marcia Wolfish in Israel, bearing appropriate postmarks and the return address of Wolfish at 25-10 30th Road, Astoria, New York, the home of Wolfish's brother-in-law, Israel Horowitz, where Wolfish resided on his trips to New York (Tr. 189, 262). Each letter opens with the salutation "Dear Marcia & children" and is signed in Hebrew as Eliezer Haim, which is translated as Louis R. (Tr. 737-739; GX 28A). Moreover, it was established from Wolfish's two passports (GX 43A and 55) and Israeli border documents that Wolfish left Israel on November 29, 1970 and returned on February 11, 1971 (Tr. 406-407; GX 42B, 43A). The first of the two letters (GX 45B) is dated January 23, 1971 and states at one point, "As things stand now I am still scheduled to return on Feb. 3rd." It was further established that

Wolfish left Israel again on November 21, 1971 and returned on December 23, 1971 (GX 42E, 42F). The second letter (GX 45A), dated November 21, 1971, describes at some length the writer's airplane flight from Israel to New York. Finally these copies of letters were seized by the Israeli police in a search of Wolfish's apartment in Jerusalem on August 9, 1972 (Tr. 442).

There, thus, can be no doubt that Wolfish authored the two letters in issue and that they were therefore properly authenticated and clearly admissible. As this Court held in similar circumstances, *"Only baseless speculation could assign these documents to any hand other than that of appellant" United States* v. *Liguori*, 373 F.2d 304, 306 (2d Cir. 1967) (emphasis supplied).

POINT VA

The trial court properly admitted the transcript of Israel Horowitz's grand jury testimony as substantive evidence.

Wolfish contends that the trial court erred in admitting the transcript of Israel Horowitz's grand jury testimony (GX 43C) as substantive evidence, and that he, Wolfish, was denied his Sixth Amendment right to confront and cross-examine witnesses against him. The argument is unsound. The challenged evidence was properly received in accordance with the settled law in this Circuit.

Israel Horowitz, Wolfish's brother-in-law, was called as a witness by the Government. Horowitz had testified in the grand jury on March 30, 1973. Through him the Government intended to establish, consistent with his grand jury testimony, that any mail addressed to the Wolfishes and received at the Horowitz residence in Astoria, Queens, was in fact picked up by Wolfish; and thus, by implication,

that it was Wolfish who in fact had received the $180,484 proceeds of the life insurance policies on his life mailed by the insurance company in check form (GX 9) to Mrs. Wolfish.

On direct examination, Horowitz testified that Wolfish, while he was living in Israel, periodically visited the Horowitz Astoria residence and picked up all mail addressed to the Wolfishes received at that location (Tr. 262); that to Horowitz's knowledge no one other than Wolfish ever picked up such mail (Tr. 261); and that to his knowledge no one in the Horowitz household ever opened any Wolfish mail (Tr. 261). During his direct examination, Horowitz invoked no Fifth Amendment privilege and no mention was made of his prior grand jury testimony.

On cross-examination, however, Horowitz asserted that he and his family had complete control of the mail that came to his house (Tr. 277); that he had "access" to the Wolfish mail (Tr. 270-271); and suggested that there were times when he had opened Wolfish's mail (Tr. 276).

At the outset of his re-direct examination, the trial court declared Horowitz a witness hostile to the Government (Tr. 281). The Government then confronted Horowitz with his grand jury testimony, both by showing him the transcript and by reading questions and answers from it. In each instance, Horowitz asserted a failure of recollection and the Government was unsuccessful in its efforts to refresh that recollection. The government then offered and the trial court later received as substantive evidence the transcript of Horowitz's grand jury testimony (Tr. 296-297, 324-325).*

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* In his grand jury testimony, which clearly contradicted his trial testimony on cross-examination, Horowitz had testified, *inter alia*, that he had never opened any mail addressed to Wolfish (Tr. 290); that with respect to all Wolfish mail received at the Horowitz residence, he had declined to look at it, simply placed it in a pile and Wolfish had later come to pick it up (Tr. 288); and that he had never given any such Wolfish mail to any third party to forward to Wolfish (Tr. 286).

Judge Pierce's ruling was plainly correct.* Horowitz's sworn grand jury testimony was inconsistent with his testimony on cross-examination, and he was available for further cross-examination with respect to that earlier sworn testimony (an opportunity defense counsel declined to avail himself of here). The transcript of the grand jury testimony was accordingly admissible as substantive evidence under the principle announced in *United States* v. *DeSisto*, 329 F.2d 929 (2d Cir.), *cert. denied*, 377 U.S. 979 (1964), and many subsequent cases. *United States* v. *Klein*, 488 F.2d 481 (2d Cir. 1973); *United States* v. *Rivera*, Dkt. No. 74-2115 (2d Cir. March 13, 1975) slip op. 2263, 2275.

The suggestion by Wolfish that the transcript was inadmissible because insufficiently authenticated is frivolous. Defense counsel expressly conceded that the transcript (GX 43C) was indeed that of Horowitz's grand jury testimony on March 30, 1973,** and Horowitz himself acknowledged his March 30, 1973 grand jury appearance.*** Wolfish's suggestion that the grand jury testimony was inadmissible

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* It should also be noted that defense counsel below did not object on any of the grounds raised here on appeal. The argument below was merely that the Government could not offer the grand jury testimony of a witness whom it called (Tr. 324-325). This alone bars Wolfish from now raising the issues here posed. *United States* v. *Indiviglio*, 352 F.2d 276, 279 (2d Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966).

** "Mr. Rosen: Judge, that is the grand jury transcript. I am not going to play around with it. That's it. I'll concede that is the testimony.

The Court: You will concede it is admissible?

Mr. Rosen: Yes.

The Court: Then there is no further requirement for this witness [Israel Horowitz]" (Tr. 297).

*** [By Mr. Schatten]

Q. I am asking you, do you recall answering—were you in the grand jury on March 30, 1973? A. Yes, I was. Yes.

Q. You were? A. Yes.

Q. Is that the transcript of your grand jury—A. I imagine. If they say it is, I imagine it is (Tr. 285).

because Horowitz had declined to acknowledge its truthfulness is frivolous. See *United States* v. *Rivera, supra,* slip op. at 2274. Indeed, had Horowitz been willing to do so there would, presumably, have been no need or basis for the admission of what then would have been simply prior consistent statements. Further, of course, Horowitz's failure of memory of the events to which he had earlier testified in the grand jury is no bar to the admission of that testimony at trial. *United States* v. *Rivera, supra; United States* v. *Insana,* 423 F.2d 1165 (2d Cir.), *cert. denied,* 400 U.S. 84 (1970).

Finally, Wolfish argues that the grand jury testimony was inadmissible because at trial Horowitz invoked his Fifth Amendment privilege concerning questions put to him in the grand jury. The assertion is factually incorrect. Horowitz answered the questions* as to which Wolfish claims Horowitz asserted the Fifth Amendment. However, even if the instances now relied on by Wolfish had occurred, they took place during Horowitz's cross-examination and pertained to subjects not raised or covered in Horowitz's grand jury testimony. Accordingly, the fact of Horowitz's supposed invocation of the Fifth Amendment on those two occasions has no conceivable bearing on the present issue.**

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* On two occasions during his cross-examination Horowitz was advised by the trial court of his Fifth Amendment rights. Following the first advice of rights, Horowitz, while first stating he would rather not answer, did then answer the pending question saying "I don't know" (Tr. 272). On the second occasion, involving a question as to whether the letter sent to Mack had been written on his stationery, Horowitz, after exhibiting a little diffidence, answered all questions put to him on the subject (Tr. 274-276).

** Wolfish's reliance on *Douglas* v. *Alabama,* 380 U.S. 415 (1965), and *Pointer* v. *Texas,* 380 U.S. 400 (1965), is misplaced. In each of those cases the declarant of the statement offered in evidence at trial was unavailable and could not be cross-examined by the defendant—either because of physical absence or because the declarant, though present, refused on Fifth Amendment grounds to answer any questions concerning the subject matter of the earlier statement.

POINT VB

The trial court was not required, *sua sponte*, to give a limiting instruction to the jury regarding Horowitz's supposed assertion of the Fifth Amendment Privilege.

Wolfish claims that the trial court committed reversible error because it did not instruct the jury, *sua sponte*, that the jury must not use Horowitz's supposed assertion of his Fifth Amendment privilege as a basis for drawing inferences adverse to Wolfish. The contention is without merit.

As noted earlier (see p. 30 n.), the factual assertion that Horowitz invoked his Fifth Amendment privilege against self-incrimination on two occasions during the trial is open to serious doubt. Assuming *arguendo* that he did so, as Wolfish claims, no limiting jury instruction was required. Wolfish's reliance on *United States* v. *Maloney*, 262 F.2d 535 (2d Cir. 1959); *United States* v. *Amadio*, 215 F.2d 605 (7th Cir. 1954); and *Weinbaum* v. *United States*, 184 F.2d 330 (9th Cir. 1950) is utterly misplaced. *Maloney* and the other cases dealt with instances where the prosecution had improperly made a conscious and flagrant attempt to build its case out of inferences arising from the assertion of the Fifth Amendment privilege by witnesses knowingly called to the stand by the prosecution for that purpose.

This is not even remotely such a case. Here the privilege was invoked, if at all, by Wolfish's own brother-in-law in response to questions put by defense counsel on cross-examination. The Government neither induced Horowitz's invocation of the Fifth Amendment nor did it know in advance that Horowitz would refuse to testify. Moreover, the Government sought no advantage from Horowitz's supposed Fifth Amendment assertion.

In contrast, defense counsel openly relied in summation on Horowitz's alleged refusal to answer as evidence of the fact that it was Horowitz, rather than Wolfish, who has authored the scheme to defraud the insurance company:

> "It is his Horowitz's stationery, no doubt about it. No matter what Fifth Amendment he takes, or how he tries to squirm around it, that is his address" (Tr. 984).

And thereafter defense counsel urged:

> "He refused to answer a question that would tend to incriminate him when showed him this [registered mail slip]. . . Why would it tend to incriminate him: Why was he interrogated about an insurance fraud? Why did he refuse to answer in this courtroom? I didn't put him on the stand: Mr. Schatten put him on the stand. Then, after he took the Fifth Amendment . . . the gentlemen had him declared a hostile witness.
>
> "Well, folks, unfortunately, if you are ever on a witness stand in a courtroom and you had to take the Fifth Amendment, I think you would be a little hostile, also. But, he didn't testify; he refused to testify because he was advised that he could incriminate himself: nobody else" (Tr. 992).

And defense counsel continued with that line of argument for some time.

In these circumstances a cautionary instruction to the jury—which needless to say defense counsel had not requested—would actually have worked against Wolfish's trial strategy. To say now that the trial erred because it did not, *sua sponte*, give some sort of limiting instruction is frivolous. *Namet* v. *United States*, 373 U.S. 179, 185-191 (1963); *cf. Edwards* v. *United States*, 361 F.2d 732 (8th Cir. 1966).

POINT VI

The trial court properly permitted Eva Bahrav's in-court identification of Wolfish as the man who had visited her on three occasions at the Israeli Consulate.

Wolfish contends that Eva Bahrav's identification of him in court was improper because it was the product of an earlier, impermissibly suggestive photographic display. The contention ignores the pertinent facts and applicable law.

Prior to Mrs. Bahrav's taking the stand, defense counsel objected to any in-court identification by her of Wolfish on the ground that she had earlier been shown, by a postal inspector and in the grand jury, an impermissibly suggestive photographic spread, from which she had selected Wolfish's photograph. Of the six or seven photographs in that spread (Defendant's Exhibits K-K6), only one—that of Wolfish—depicted a bearded man. The trial court excluded the Government from introducing any evidence of Mrs. Bahrav's photographic identification, but permitted her to make an in-court identification of Wolfish (Tr. 605-612).

Whether Mrs. Bahrav's in-court identification was properly admitted turns on whether the photographs which were shown to her were so "impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification." *Simmons* v. *United States*, 390 U.S. 377, 384 (1968); *United States* v. *Evans*, 484 F.2d 1178 (2d Cir. 1973). The inquiry under *Simmons* is two-pronged: whether the initial identification procedure was impermissibly suggestive, and, if so, whether the procedure had such a tendency " 'to give rise to a very substantial likelihood of irreparable misidentification' that allowing the witness to make an in-court identification would be a denial of due process of law". Resolution of the latter issue "depends

on the totality of the circumstances." *United States ex rel. Phipps* v. *Follette*, 428 4 F.2d 912, 914-915 (2d Cir.), *cert. denied*, 400 U.S. 908 (1970). See also *Neil* v. *Biggers*, 409 U.S. 188, 199 (1972).

In this case the spread shown Mrs. Bahrav concededly contained suggestive elements since only one photograph, that of Wolfish, depicted a bearded man. Any apparent suggestiveness is lessened, however, by the fact that Mrs. Bahrav testified at trial that she did not recall that Wolfish had a beard at the time of her meetings with him in 1971 (Tr. 657), and by her ability independently to describe his weight, hair color, height and other features (Tr. 647), and their conversations.* Moreover, there was nothing the least bit suggestive about the manner in which the photographic spread was displayed (Tr. 704, 709, 711-712).

However, even assuming *arguendo* that the spread shown Mrs. Bahrav was impermissibly suggestive, it is plain that it was not the source of her in-court identification of Wolfish. *United States ex rel. Gonzalez* v. *Zelker*, 477 F.2d 797 (2d Cir.), *cert. denied, sub nom. Gonzalez* v. *Vincent*, 414 U.S 924 (1973); *United States ex rel. Frasier* v. *Henderson*, 464 F.2d 260, 265 (2d Cir. 1972); *United States ex rel. Beyer* v. *Mancusi*, 436 F.2d 755 (2d Cir.), *cert. denied*, 403 U.S. 933 (1971). Her testimony made clear that she had dealt face-to-face with Wolfish on three separate occasions at the Israeli Consulate in January 1971; that each occasion pertained to the certification of death certificates; that she had seen him for five to ten minutes on January 5, 1971 and for ten minutes on January 12 and 13, 1971 (Tr. 646); and that she had been sitting directly across a desk from him in a well-lit office area (Tr. 707). Moreover, Mrs. Bahrav remembered the conversations which she and Wolfish had had in the course of his visits (Tr. 622-624, 641-642). She testified that she had paid particular attention to Wolfish because requests for death certificate translations and certi-

* The record is silent on whether Wolfish wore a beard in January 1971 at the time of the visits to the Israeli Consulate testified to by Mrs. Bahrav. At trial, Wolfish was clean-shaven.

fications were "very unusual" (Tr. 698, 699) and because Wolfish on January 5, 1971 had "asked [her] about every aspect of, you know, I put the ribbon on and stuff like that, and what exactly the form on it says" (Tr. 622). Further, as to the January 12 meeting, Mrs. Bahrav testified that that was the one and only time in her experience that anyone had brought in eleven death certificates for certification (Tr. 705). In sum, her opportunity to observe Wolfish was far better than that of the witnesses in many cases where highly suggestive procedures had been employed and where in-court identifications have nonetheless been permitted and upheld. *Neil* v. *Biggers, supra; United States* v. *Yanishefsky*, 500 F.2d 1327 (2d Cir. 1974); *United States ex rel. Gonzalez* v. *Zelker, supra* 477 F.2d at 801; *United States* v. *Counts*, 471 F.2d 422, 424-25 (2d Cir.), *cert. denied*, 411 U.S. 939 (1973); *United States ex rel. Robinson* v. *Zelker*, 468 F.2d 159, 163-165 (2d Cir. 1972), *cert. denied*, 411 U.S. 939 (1973); *United States ex rel. Bisordi* v. *La Vallee*, 461 F.2d 1020, 1024 (2d Cir. 1972). Indeed, Mrs. Bahrav further testified that the basis for her in-court identification was her recollection of the man who had come to her desk at the Consulate, not the photograph she had been shown (Tr. 713).*

Moreover, there was no possibility here that an impermissibly suggestive spread of photographs had occasioned a misidentification in court. The fact that it was, indeed,

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* Although Mrs. Bahrav stated at one point she 'thought" Wolfish was the man she had dealt with and observed (Tr. 617), she later made an unqualified identification of Wolfish (Tr. 710, 713). In either event, her testimony was sufficient to raise an issue for the jury. *United States* v. *Lewis*, 485 F.2d 236 (5th Cir. 1973), *cert. denied*, 415 U.S. 980 (1974); *United States* v. *Kelley*, 334 F. Supp. 435 (S.D.N.Y. 1971) (per Weinfeld, *J.*), *aff'd*, 471 F.2d 647 (2d Cir. 1973).

Wolfish who had visited Mrs. Bahrav at the Consulate was fully corroborated by other evidence in the record linking Wolfish to the crime. Most importantly, the Government established that the *very same* certifications Mrs. Bahrav had attached to the death certificates provided to her at the Consulate by Wolfish on January 5 and 12, 1971, and which she identified at trial (GX 28A, 28B, 29A-29I) were seized by the Israeli police during the 1972 search of Wolfish's residence, along with a forged death certificate (GX 30), a copy of which Wolfish had shown to Mrs. Bahrav. These facts virtually eliminate any scant risk that any misidentification could have occurred here. See *United States ex rel. Gonzalez* v. *Zelker, supra,* 477 F.2d at 803-804; *United States* v. *Bynum,* 485 F.2d 496, 503-504 (2d Cir. 1973), *vacated on other grounds* 417 U.S. 903 (1974).

Finally, the trial court's charge to the jury on the subject of Mrs. Bahrav's identification testimony was more than adequate (Tr. 1109-1112). *United States* v. *Evans,* 484 F.2d 1178, 1187-1188 (2d Cir. 1973); *United States* v. *Fernandez,* 456 F.2d 638, 643-644 (2d Cir. 1972). The court's instruction, coupled with defense counsel's vigorous cross-examination of Mrs. Bahrav on all the facets of her in-court identification, including her exposure to the spread and the summation, amply protected Wolfish's rights.

POINT VII

Wolfish's claim that the trial court erred in refusing to order the Government to produce certain reports is mooted by the fact that no such reports exist.

Wolfish claims that the trial court erred when it refused to order the Government to turn over any reports bearing on the issue of whether the typewriter of Israel Horowitz, located at the Horowitz resident in Astoria, Queens, had been used to prepare any of the documents received in evi-

dence at trial. The short answer to this contention is that this Office has learned from the postal inspector in charge of this case that there are no such reports.*

POINT VIIIA

The trial court did not improperly deny Wolfish his right to counsel of his own choosing.

Wolfish argues that the trial court arbitrarily and capriciously denied Wolfish his right to counsel of his own choice, *i.e.*, Roy Cohn, Esq., whom allegedly Wolfish had retained to represent him at the trial. This contention is utterly lacking in merit.

The facts pertaining to Wolfish's legal representation are briefly as follows: In connection with Wolfish's surrender to federal authorities on February 14, 1974, Michael Rosen, Esq., Mr. Cohn's partner, acted as Wolfish's counsel and appeared at a preliminary interview conducted by an Assistant United States Attorney and two postal inspectors. Mr. Cohn was not present at the interview.

On February 15, 1974, the law firm of Saxe, Bacon, Bolan and Manley ("Saxe, Bacon"), by Mr. Rosen, a mem-

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* Shortly after the investigation began, in April 1972, two postal inspectors visited the Horowitz residence, obtained exemplars from Horowitz's typewriter and informally ascertained that this typewriter was not the one which had been utilized in preparing the English translation of the death certificate (GX 1), which had been submitted to the insurance company. The postal inspectors decided it would be fruitless to submit these exemplars to the laboratory for comparison purposes. Subsequently, the postal inspectors learned that it was the Israeli notary, Emanuel Mack, who had prepared the English translation of this death certificate, and eight other identical death certificates (Tr. 144-146).

ber of that firm, filed a notice of appearance on behalf of Wolfish. Mr. Rosen appeared with Wolfish at his arraignment on March 14, 1974. Mr. Cohn, also a member of the same firm, was not present at the arraignment.

At each of the pretrial conferences thereafter held before either Judge Bauman or Judge Pierce on July 1, 1974, August 7, 1974, December 17, 1974 and January 3, 1975, Wolfish was present and represented by Mr. Rosen. Mr. Cohn never appeared in court in connection with this case.

On or about December 17, 1974, Saxe, Bacon moved for leave to withdraw as defense counsel, citing friction with Wolfish and other related factors. Wolfish did not consent to this motion.* Judge Pierce denied the motion to withdraw but stated that he would entertain a motion for substitution of counsel if Wolfish could obtain private counsel who would be ready to proceed to trial on January 6, 1975. The trial court also referred Wolfish to a Magistrate for a determination as to whether, in view of his financial condition, Wolfish would be eligible for assigned counsel. Judge Pierce indicated that, although Wolfish could obtain new counsel if he wished, Judge Pierce would not permit disruption of the January 6, 1975 trial date, set five months earlier, particularly since he was scheduled to preside over a long antitrust trial several months later and his calendar in the intervening weeks was full.

Shortly thereafter, Wolfish moved *pro se* for an order directing Mr. Cohn to try the case as his attorney or, in the alternative, for an order fixing the reasonable fee of the

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* On December 17, 1974, Wolfish stated, in response to the trial court's questioning, that his tentative view was to oppose the motion to withdraw, but that he wished to have the advice of other counsel before determining his final position (Tr. of 12/17/74, p. 13).

Saxe, Bacon firm. Wolfish's contentions that he had retained Mr. Cohn, personally, to represent him at trial were controverted by affidavits submitted by both Mr. Cohn and Mr. Rosen. Judge Pierce denied the motion.*

The refusal of the trial court to be taken in by this dilatory maneuver was entirely proper. The evidence before Judge Pierce conclusively demonstrated that Wolfish, a former member of the Bar, knew all along that Mr. Rosen would be his trial attorney. A notice of appearance had been filed in the name of Saxe, Bacon, by Mr. Rosen. Mr. Rosen, not Mr. Cohn, had appeared for Wolfish at each and every pretrial conference at which Wolfish was represented in this matter. In these conferences, with Wolfish present, discussions were had concerning the scheduling of trial which made it plain that Mr. Rosen was trial counsel. At the August 7, 1974 conference, for example, a January 1975 trial date was discussed. Mr. Rosen noted at one point that he could not be certain of his schedule because his diary did not go beyond December 21 (Tr. of 8/7/74, p. 19). No attempt was made to contact Mr. Cohn to ascertain his schedule. Wolfish at that time raised no question or objection concerning Mr. Rosen's obvious intention to try his case.

In dealing with Wolfish's motion, Judge Pierce was faced with nothing less than a blatant attempt by Wolfish "to manipulate his right to counsel for the purpose of delaying and disrupting the trial." *United States* v. *Sper-*

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* On or about December 28, 1974, Wolfish sought a writ of mandamus *pro se* requiring the trial court, *inter alia*, to hold a hearing on defense counsel's motion to be relieved; to fix counsel fees; and to grant a postponement of trial to permit new counsel—which he had not obtained—or himself *pro se*, to prepare for trial. Wolfish's petition was denied by this Court on December 30, 1974. Dkt. No. 74-2695 (2d Cir., Dec. 30, 1974).

ling, 506 F.2d 1323, 1337 n. 19 (2d Cir. 1974). Wolfish had previously engaged in a series of dilatory manuevers in connection with the furnishing of his court-ordered exemplars (Tr. of 1/3/75, pp. 9-11). Judge Pierce's refusal to allow a withdrawal of counsel unless defendant obtained replacement counsel who would be prepared to go to trial on January 6, 1975 was an eminently sound exercise of discretion. *United States* v. *Clausell,* 389 F.2d 34 (2d Cir. 1968); *United States* v. *Llanes,* 374 F.2d 712, 717 (2d Cir.), *cert. denied,* 388 U.S. 917 (1967).* In view of this record, Wolfish's assertion that he was entitled to a hearing on his motion is frivolous.

POINT VIIIB

The trial court properly refused to permit Wolfish, who was represented by experienced counsel, to participate as co-counsel in the defense of his case.

Wolfish argues that the trial court erred in refusing to permit him to participate as co-counsel in the conduct of his own defense. In so doing, Wolfish asserts, the trial court improperly denied him the right to share in the various tactical decisions of that defense.

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* In *United States ex rel. Davis* v. *McMann,* 386 F.2d 611, 618-19 (2d Cir. 1967), *cert. denied,* 390 U.S. 958 (1968) this Court emphasized that:

> "Though a defendant has a right to select his own counsel if he acts expeditiously . . ., he may not use his right to play a 'cat and mouse' game with the court . . . , or by ruse or stratagem fraudulently seek to have the trial judge placed in a position where, in moving along the business of the court, the judge appears to be arbitrarily depriving the defendant of counsel" (citations omitted).

This argument is likewise lacking in merit. Wolfish has cited no legal authority,* which requires that an accused be permitted to appear as "co-counsel," along with his retained or appointed counsel, in the defense of the charges against him.

Wolfish's assertion that the trial court's refusal to allow him to share the reins as "co-counsel" with Mr. Rosen improperly prevented him from participating in the tactical decisions of his defense is likewise without merit. As the trial court made clear, Wolfish was fully entitled to make all such decisions if he elected to discharge his experienced attorney and to proceed to defend the case *pro se*. Wolfish chose, however, not to do so. Having tried that deliberate tactic unsuccessfully, Wolfish may not now be heard to claim that his Sixth Amendment rights were violated.

In *United States* v. *Calabro*, 467 F.2d 973 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973), this Court held that an attorney was not required to comply with his client's demand not to enter into a stipulation that certain bonds were stolen. In so doing this Court noted that the client's

> "claim that this was an improper act which justified the dismissal is unfounded. The American Bar Association Project on Standards for Criminal Jus-

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* *United States ex rel. Maldonado* v. *Denni*, 348 F.2d 12 (2d Cir. 1965), *cert. denied sub nom. Di Blasi* v. *McMann*, 384 U.S. 1007 (1966); *People* v. *McIntyre*, 36 N.Y.2d 10, 364 N.Y.S. 2d 837 (1974) and *United States* v. *Plattner*, 330 F.2d 271 (2d Cir. 1964), which are relied on by Wolfish, are inapposite. In those cases the defendants had been denied the right to proceed *pro se*. In *Meeks* v. *Craven*, 482 F.2d 465 (9th Cir. 1973), the court held that the defendant, having failed to make an unequivocal demand to represent himself *pro se*, could not claim that his Sixth Amendment rights had been violated. In the present case, Wolfish, similarly, cannot be said to have made an unequivocal demand to proceed *pro se*. His expressed desire to be "co-counsel" was anything but an unequivocal desire to proceed *pro se*.

> tice concludes that a defendant is entitled to make the ultimate decision only on whether to waive a jury, and whether to testify; 'all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client.' Standards Relating to the Prosecution Function and the Defense Function, approved draft 1971. The Defense Function § 5.2" 467 F.2d at 985-986.*

Similarly in *Legal Aid Society* v. *Herlands*, 399 F.2d 343, 347 (2d Cir. 1968), *cert. denied*, 393 U.S. 1033 (1969), this Court emphasized that a client has "responsibilities . . . not to invade counsel's sphere—responsibilities that rest equally on a client who [like Wolfish] is himself a lawyer even though he may find it harder to observe them. . ." See *Nelson* v. *State of California*, 346 F.2d 73 (9th Cir.), *cert. denied*, 382 U.S. 964 (1965).

The "numerous differences as to trial strategy" of which Wolfish now complains are, if anything, little more than the complaints of a "Monday-morning quarterback." Wolfish's Sixth Amendment rights were scrupulously observed.

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* Wolfish's claim here that he wished to take the stand in his defense appears to be an entirely new one, raised for the first time on this appeal. There is nothing in the record below to support it. Indeed, the fact that Wolfish did not take the stand might more readily be explained by the overwhelming strength of the Government's case, and Wolfish's apprehension of how he would fare on cross-examination—particularly in light of the fact that the Government might have been entitled to elicit the fact of his disbarment for misconduct quite similar to that with which he was charged here. See *United States* v. *Buckner*, 108 F.2d 921, 927 (2d Cir.), *cert. denied*, 309 U.S. 669 (1940).

POINT iXA

The trial court correctly found that Wolfish was not entitled to the production of Court Exhibit 4.

Wolfish asks this Court to review the trial court's exercise of its discretion in withholding from him production of Court Exhibit 4. The trial court's determination was correct.

Court Exhibit 4 pertains to a minor Government witness, Coradino Gatti, a State Department foreign officer. Gatti's brief testimony was devoted almost entirely to the introduction into evidence of, and the reading of entrances into and departures from Israel set forth in, a passport Wolfish had turned in to Gatti in Jerusalem (Tr. 297-307; GX 43A). In connection with Gatti's testimony and pursuant to Title 18, United States Code, Section 3500, the Government turned over to the defense a number of documents. Also in connection with Gatti's appearance, the Government furnished to the trial court, but not to the defense, additional letters and documents, identified as Government Exhibit 3569, which the Government asserted were not producible. The trial court agreed.

Although Gatti's testimony in no way related to the search by the Israeli police of Wolfish's home in Jerusalem on August 9, 1972, Wolfish now asks this Court to determine whether under 18 U.S.C. § 3500 or *Brady* v. *Maryland*, 373 U.S. 83 (1963), Court Exhibit 4 was required to have been turned over to him insofar as it contained material relating to the Israeli search.

So far as this request is premised on Section 3500 it is patently frivolous, since Gatti's testimony had nothing whatever to do with the Israeli search. Furthermore, whether a prior statement by a prosecution witness is sufficiently related to the subject matter of his direct testimony

to warrant a direction to the Government to disclose it is a matter for the trial judge's discretion, and his decision is subject to reveal only if clearly erroneous. *United States* v. *Gugliaro*, 501 F.2d 68, 72 (2d Cir. 1974); *United States* v. *Pacelli*, 491 F.2d 1108 (2d Cir.), *cert. denied*, 419 U.S. 826 (1974); *United States* v. *Covello*, 410 F.2d 536 (2d Cir. 1969), *cert. denied*, 396 U.S. 879 (1970).

Since Court Exhibit 4 in no way related to Gatti's direct testimony in this case, Judge Pierce's ruling was plainly not an abuse of discretion. *United States* v. *Pacelli*, *supra*, 491 F.2d at 1119-1120; *United States* v. *Umans*, 368 F.2d 725, 731 (2d Cir. 1966), *cert. denied*, 389 U.S. 80 (1967); see generally, *United States* v. *Birnbaum*, 337 F.2d 490 (2d Cir. 1964); *United States* v. *Cardillo*, 316 F.2d 606 (2d Cir.), *cert. denied*, 375 U.S. 822 (1963).

Wolfish's claim under *Brady* v. *Maryland*, *supra*, warrants equally short shrift, because his arguments rest on a distortion of the obligations imposed on the Government by *Brady*. This case is not, strictly speaking, a case governed by *Brady* v. *Maryland*, *supra*.

[I]n . . . *Moore* v. *Illinois*, 408 U.S. 786, 794 (1972), the Supreme Court reiterated that '[t]he heart of the holding in *Brady* is the prosecution's *suppression of evidence*, in the face of defense production request, where the evidence is favorable to the accused and is material either to guilt or punishment' (Emphasis supplied). . . . Applying *Brady's* rationale here, it is readily apparent that an essential element is missing. There was no suppression of exculpatory evidence by the government. On the contrary, the government turned over the requested [material] to the trial judge for *in camera* inspection and ruling." *United States* v. *Ruggiero*, 472 F.2d 599, 604 (2d Cir.), *cert. denied*, 412 U.S. 939 (1973). See also *United States* v. *Gugliaro*, *supra*, 501 F.2d at 73.

In sum, defendant's claims with respect to Court Exhibit 4 are without merit.*

POINT IXB

Judge Pierce correctly denied Wolfish's motion to suppress certain physical evidence seized by Israeli police during a search of Wolfish's Jerusalem apartment.

Wolfish asserts that Israeli police, acting as agents for United States authorities, conducted an unlawful search of his Jerusalem apartment and that the admission in evidence at trial of documents seized during that search violated his Fourth Amendment rights. The assertions are legally and factually in error.

On January 6, 1975, prior to trial, Judge Pierce conducted an evidentiary hearing on Wolfish's motion to suppress. The Government offered the testimony of former Assistant United States Attorneys Thomas Fitzpatrick and Maurice M. McDermott, who were in charge of the case during the summer of 1972, United States Postal Inspector John Slavinski and Major Ahoron Halpern, the Israeli police official who conducted the search.

At the hearing, it was established that at the commencement of the investigation in this country in or about April 1972, Postal Inspector Slavinski furnished to the Israeli Consulate in New York a copy of the forged Israeli death certificate of Wolfish which the insurance company

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* We note in passing that in connection with the pre-trial suppression hearing, the Government furnished to defense counsel all documents which it possessed bearing on the matter of American-Israeli contact (and the lack of such contact) with respect to the search of Wolfish's home in Jerusalem.

had received (GX 1), and requested Israeli officials to ascertain if Wolfish was alive and if the death certificate was legitimate (H.Tr. 59).* Subsequently, Inspector Slavinski learned from the Israeli officials that Wolfish was alive; that he had been travelling in and out of Israeli; and that the death certificate was not authentic since Israeli death certificates are handwritten, whereas Government Exhibit 1 had been typewritten (H.Tr. 60).

Sometime thereafter, Assistant United States Attorney Thomas Fitzpatrick contacted the State Deparmen in Jerusalem and sought to have a grand jury subpoena served on Wolfish. In connection with that matter, the Israeli police agreed to assist in locating Wolfish (H.Tr. 28). Sometime in July 1972, the subpoena was served on Wolfish at Israeli Police headquarters by a State Department official (H.Tr. 44, 57).

At or about this time in mid-July 1972, Assistant United States Attorney Fitzpatrick began a terminal vacation period, returning for only a few days prior to officially leaving the United States Attorney's Office in September 1972. The case was reassigned at this time to Assistant United States Attorney McDermott (H.Tr. 21-22).

On August 9, 1972, the Israeli police, pursuant to search warrant (H.Tr. 99100; H.GX 5-6),** conducted a search of Wolfish's Jerusalem apartment in connection with their investigation of various violations of Israeli law (H.Tr. 89-91).*** The idea for the search came from Major Ahoron

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* References to pages in the hearing transcript are abbreviated herein as "H. Tr.".

** Government Exhibits at the suppression hearing are abbreviated herein as "H. GX".

*** The search was conducted by two Israeli police officials in the presence of Mrs. Wolfish and two witnesses, who were neighbors of the Wolfishes (H.Tr. 85).

Halpern, who along with another police official, conducted the search (H.Tr. 87). No American official directed, asked or even suggested that the search be undertaken (H.Tr. 39, 51, 69, 87). Halpern testified that nobody asked him to undertake the search and that he "decided to make the search" (H.Tr. 87). Halpern also testified that after he had formulated the idea for the search, he had spoken to Commander Roth, his superior, who agreed with it (H.Tr. 89).

Following the search, Commander Roth of the Israeli police apparently made a telephone call to the Israeli Embassy here, and the Embassy, in turn, notified the Office of the United States Attorney that the Israeli police had material proving beyond any doubt that Wolfish himself forged the death certificate (H.GX 2). It was only months after the search, in February or March 1973 that Israeli authorities furnished documents seized from Wolfish's apartment to American officials (H.Tr. 48-50).

At the hearing's conclusion, Judge Pierce made certain findings:

> "I do not find that the Israeli authorities were proceeding at the direction of the United States in making the search. Further, if they were not to ask the Israeli authorities whether the death certificate was valid or invalid who were they to ask? The fact that the American authorities triggered the interests of the Israeli Government is of no import, if indeed the Israeli authorities thought that their laws were violated" (H.Tr. 97).

And further:

> "I do not find that anything the Israeli authorities did was conduct such as would shock the conscience of our courts here. I find simply that they were about business pertaining to their own respective laws" (H.Tr. 96).

In light of these findings, clearly supported by the record, and in reliance on *United States* v. *Callaway*, 446 F.2d 753 (3d Cir. 1971) and *Birdsell* v. *United States*, 346 F.2d 775, 782 (5th Cir.) (Friendly, C.J., sitting by designation), *cert. denied*, 382 U.S. 963 (1965), Judge Pierce denied Wolfish's motion to suppress. In so doing, he noted that there was no need to inquire into whether the Israeli procedures comported with the Fourth Amendment (H.Tr. 95-98), having found that the Israeli law enforcement officials in undertaking the search were not acting at the direction of American authorities; that there was no substantial participation by Americans in connection with the search of Wolfish's home in Jerusalem; and that the conduct of the Israeli officials was not in the least bit uncivilized.*

That ruling was plainly correct. The Fourth Amendment does not apply where the challenged search was "conducted by foreign law enforcement officials who were not acting in connection or cooperation with domestic law enforcement authorities and the conduct involved was not the type that would shock the conscience of our courts." *United States* v. *Callaway*, *supra*, 446 F.2d at 755. See *United States* v. *Welch*, 455 F.2d 211, 213 (2d Cir. 1972) (*per curiam*); *Brulay* v. *United States*, 383 F.2d 345 (9th Cir.), *cert. denied*, 389 U.S. 986 (1967); *Stonehill* v. *United States*, 405 F.2d 738 (9th Cir. 1968), *cert. denied*, 395 U.S. 960 (1969).**

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* Wolfish's attempted comparison between the instant case and *United States* v. *Toscanino*, 500 F.2d 267 (2d Cir. 1974), is simply ludicrous.

** Wolfish erroneously (at 49) claims that subsequent to trial in this case, the Israeli Courts declared that the August 9, 1972 search was illegal. That is not so. The Israeli Court on February 10, 1975 went no further than to rule that the Israeli police should have not turned over the documents to American authorities in the absence of an Israeli or an American Court Order, and determined that a subsequent hearing should be held to examine the death certificates and other fruits of the crime

[Footnote continued on following page]

POINT X

The trial court did not err in denying Wolfish's request to adjourn the suppression hearing.

Wolfish contends that he was denied due process of law by reason of the trial court's refusal to adjourn the suppression hearing to permit Wolfish time to call two additional witnesses. The contention is frivolous.

At the suppression hearing, the Government adduced the testimony of four witnesses, including the two former Assistant United States Attorneys who at the relevant time had been assigned to the case, the Postal Inspector assigned to the case, and Major Halpern of the Israeli National Police, who had both formulated the idea for, and conducted the search of Wolfish's Jerusalem apartment.

At the concluding stage of that one-day hearing, Wolfish for the first time announced his desire to compel the appearance and testimony of Commander Roth of the Israeli National Police, and of a State Department official, such as John Mallon or John Toffit (H.Tr. 93). The trial court denied Wolfish's application (H.Tr. 94). The ruling was plainly correct.

Defense counsel had been on notice as to the existence of these witnesses for over six months—since June 21, 1974. On that date, the Government had furnished defense counsel a copy of a memorandum of Assistant United States Attorney Fitzpatrick which set forth the substance of a tele-

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seized in the search (Appendix 389a). Subsequently, Judge Pierce, with the consent of the parties, entered an Order, filed April 2, 1975, retaining the documents here (Tr. of 3/31/74, pp. 614-615). This appears to have been satisfactory to the Israeli Court since we have been advised that it has postponed its hearing for an additional 60 days.

phone call from Commander Roth to the Israeli Embassy in New York in regard to the materials taken from Wolfish's Jerusalem apartment (H.GX 2); and a copy of a memorandum from John Toffit of the State Department, dated July 27, 1972, relating to the service of the grand jury subpoena on Wolfish by Mallon and Toffit (H.Tr. 78-80). Defense counsel, nonetheless, did nothing to secure the appearance of any of these individuals until near the end of the hearing. Moreover, Commander Roth, an Israeli citizen, was beyond the trial court's subpoena power, although had an advance request been made of the Government an effort could have been made to secure his appearance.

The trial court acted well within its sound discretion in denying Wolfish's untimely request for an adjournment which would have resulted in a delay in the commencement of the trial. That is particularly true here since Wolfish could make no showing of what he expected the testimony of the sought-after witnesses would be—offering instead only rank speculation as to what they might say. The trial court properly concluded that it was highly doubtful and speculative that the desired testimony would have been material in any respect (H.Tr. 93-94). That conclusion accorded with the trial court's finding crediting Major Halpern's testimony that in conducting the search and seizure the Israeli police acted entirely on their own, without any instigation or involvement of American authorities (Tr. 87, 94-95).

In *United States* v. *Rosa*, 493 F.2d 1191 (2d Cir. 1974), this Court recognized the broad discretion accorded a trial judge faced, as here, with a situation where defense counsel makes an untimely request to call additional witnesses, in the speculative hope that their testimony might in some manner salvage his position in the suppression hearing.

This Court there said:

> "In such a setting we cannot conclude that the court abused its discretion in ruling as it did. If counsel for Rosa had really required the testimony, he should have subpoenaed the agents before or during the course of the hearing and thereby avoided any dependence on the hearing judge's discretion." 493 F.2d at 1194.

POINT XI

There was abundant evidence from which the jury could reasonably have found that Wolfish knowingly caused the mails to be used.

Wolfish erroneously claims that the evidence was insufficient to establish that he knowingly caused the mails to be used—an element of offenses predicated on the Mail Fraud Statute, Title 18, United States Code, Section 1341. The contention is frivolous. It is well settled that one causes the mail to be used, within the meaning of the statute, where he does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended. *Pereira* v. *United States*, 347 U.S. 1 (1954).* Wolfish's claim here is belied by a brief recital of how the mailings charged in the indictment occurred.

Following notification of the supposed death of Louis Wolfish, the insurance company first mailed to Mrs. Wol-

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* Wolfish relies on *United States* v. *Maze*, 414 U.S. 395 (1974), in support of his contention, but *Maze* dealt with entirely different facts in which the fraudulent scheme came to fruition before the use of the mails occurred. Such is not the case here. Rather, as in *Pereira* and *United States* v. *Marando*, 504 F.2d 126 (2d Cir.), *cert. denied sub nom. Berardelli* v. *United States*, 419 U.S. 1000 (1974), the mailings allowed Wolfish to realize the fruits of his scheme. *Marando* makes clear that *Maze* is not relevant to this factual pattern.

fish, the beneficiary under the policies, a letter enclosing a claimant's statement to be filled out by the beneficiary and instructions on how to proceed, including a requirement that a death certificate be sent to the company (Count Or (Tr 22-33). The insurance company received thereafter, by mail, the claimant's statement, the insurance policies and the forged Israeli death certificate (Tr. 36-40). In response to these documents the insurance company mailed the first check in the amount of $180,484 to Mrs. Marcia Wolfish at the Spring Valley address (Count Two) and, following the receipt of the necessary tax waiver form, mailed the $20,000 check to Howard Blatt, a general agent, for delivery to Mrs. Wolfish (Count Three) (Tr 45-47, 50-53).

There was no evidence here that Wolfish intended to execute his scheme in some way other than by the use of the mails—as, for example, by personal contacts—much less that he could not reasonably have foreseen the insurance company's use of the mails. Common experience alone suggested the high probability of the insurance company's use of the mails in these circumstances. Moreover, the change of address forms Wolfish utilized (GX 21A, 21B) to cause his mail to be forwarded from Spring Valley to Astoria, coupled with the mailings between the United States and Israel (GX 22, 24-25) attributable to Wolfish, make clear that the use of the mails was essential to the scheme.

Having reached the conclusion that Wolfish had designed the fradulent scheme to collect on his life insurance policies, the jury had an abundance of evidence from which to conclude beyond a reasonable doubt that Wolfish knew that the insurance company would employ the mails in the ordinary course of its business in transferring to the claimant by check the more than $200,000 in proceeds of the policies.

CONCLUSION *

The judgment of conviction should be affirmed.

Respectfully submitted,

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

STEVEN A. SCHATTEN,
ALLEN R. BENTLEY,
ANGUS MACBETH,
JOHN C. SABETTA,
Assistant United States Attorneys,
Of Counsel.

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* We recently received Wolfish's Point XII which argues that the trial court erred in failing to hold a competency hearing. The contention fails to note, however, that, only shortly after the discussions quoted in Wolfish's argument took place, Wolfish (through counsel) and his attorney both made clear that Wolfish was fully competent to stand trial, Tr. of 1/6/75, pp. 13-15 (morning session); and that right before trial Wolfish himself had prepared an elamorate mandamus petition in this case. Accordingly, no issue of competency arises. *E.g., United States ex rel. Curtis* v. *Zelker*, 446 F.2d 1092, 1096 n.8, (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973); *United States ex rel. Roth* v. *Zelker*, 455 F.2d 1105, 1108 (2d Cir. 1971), *cert. denied*, 408 U.S. 927 (1972).

Form 279 - Affidavit of Service by Mail

SAS:emw

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

STEVEN A. SCHATTEN being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 16th day of June, 1975 he served a copy of the within brief for the United States of America by placing the same in a properly postpaid franked envelope addressed:

Stanley H. Fischer, Esq.
Two Park Avenue
New York, N.Y. 10016

And deponent further says that he sealed the said envelope and placed the same in the mail box ~~drop~~ for mailing outside the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Steven A Schatten

STEVEN A. SCHATTEN
Assistant United States Attorney

Sworn to before me this

16th day of June, 1975

Steven A Schatten

Jeanette Ann Graven

JEANETTE ANN GRAVEN
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977